

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WILLIAM MCKINNEY,

Plaintiff,

v.

BAYER HEALTHCARE LLC and BAYER
HEALTHCARE PHARMACEUTICALS, INC.,

Defendants.

No. C 09-05561 CW

ORDER DENYING
DEFENDANT'S
MOTION FOR
SUMMARY JUDGMENT
(Docket No. 33)

Plaintiff William McKinney charges his former employer Defendant Bayer Healthcare LLC with (1) disability discrimination, in violation of California's Fair Employment and Housing Act (FEHA); (2) failure to accommodate his disability, in violation of FEHA; (3) failure to engage in a good faith interactive process regarding an accommodation for his disability, in violation of FEHA; (4) retaliation, in violation of FEHA; (5) retaliation for requesting and taking leave, in violation of the California Family Rights Act (CFRA); and (6) wrongful termination in violation of public policy. Defendant moves for summary judgment or, in the alternative, partial summary judgment.¹ Plaintiff opposes Defendant's motion. Defendant objects to evidence Plaintiff proffered in support of his opposition. Plaintiff objects to evidence proffered by Defendant in support of its reply. The

¹ Plaintiff's seventh claim for intentional infliction of emotional distress and his claims against Defendant Bayer Healthcare Pharmaceuticals, Inc., have been dismissed pursuant to stipulation.

1 motion was heard on January 27, 2011. Having considered oral
2 argument and the papers submitted by the parties, the Court DENIES
3 Defendant's motion for summary judgment.

4 Defendant argues that it is entitled to summary judgment on
5 Plaintiff's disability discrimination claim because he was not a
6 qualified individual and because he fails to proffer evidence of
7 pretext. Qualified individuals are those who can perform the
8 essential functions of a job, with or without accommodation.
9 Nadaf-Rahrov v. Neiman Marcus Group, Inc., 166 Cal. App. 4th 952,
10 961 (2008). Essential functions are the "fundamental job duties of
11 the employment position the individual with a disability holds or
12 desires." Cal. Gov. Code § 12926(f). Although California courts
13 have not addressed whether employers or employees have the burden
14 to establish essential functions, the Ninth Circuit has held that,
15 under the Americans with Disabilities Act (ADA), employers bear the
16 burden. Bates v. United Parcel Serv., 511 F.3d 974, 991 (9th Cir.
17 2007). Here, Defendant has not established, as a matter of law,
18 that working after 6:00 p.m. was an essential function of a
19 Maintenance Supervisor. Further, Plaintiff has offered sufficient
20 evidence of pretext. Defendant does not dispute that, although it
21 claimed that it converted Plaintiff's job to fill a need during the
22 swing shift, it never hired an employee for that position after he
23 was discharged. Although Defendant may have had a legitimate
24 reason for leaving the position open, a jury could infer from
25 Defendant's failure to fill it that the proffered reason for
26 transferring Plaintiff to the swing shift was pretext. Thus,
27 summary judgment is not warranted on this claim.

1 Defendant's arguments concerning Plaintiff's failure to
2 accommodate claim are unavailing for similar reasons. Defendant
3 does not establish that Plaintiff was not a qualified individual.
4 Further, Defendant does not establish, as a matter of law, that
5 maintaining Plaintiff on the day shift would have been an undue
6 burden.

7 Nor is summary judgment appropriate on Plaintiff's claim for
8 failure to engage in a good faith interactive process. Although
9 Defendant met with Plaintiff to discuss alternative positions,
10 Plaintiff claims that Defendant did not participate in good faith
11 because it lied to him about its ability to maintain his day shift
12 Maintenance Supervisor position. Plaintiff offers evidence that
13 Defendant did not inform Sullivan that he would be supervising day
14 shift janitors until after it discharged Plaintiff, which suggests
15 that Plaintiff could have continued in his position. This could
16 support an inference that Defendant deceived Plaintiff and, thus,
17 did not participate in the interactive process in good faith.

18 With regard to his FEHA retaliation claim, Plaintiff alleges
19 that Defendant retaliated against him for complaining about CFRA
20 violations and requesting an accommodation. Defendant does not
21 dispute that these constitute protected activities, nor does it
22 argue that Plaintiff did not suffer adverse employment actions.
23 One day after Plaintiff complained that his position was posted for
24 hiring while he was on leave, Defendant extended Sullivan a job
25 offer. And after Plaintiff sought an accommodation, Russey wrote
26 Plaintiff stating that Sullivan's hiring, in part, precipitated
27 Plaintiff's involuntary transfer to the swing shift. This transfer
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1 ultimately led to Plaintiff's discharge. This evidence could
2 support an inference that Defendant retaliated against Plaintiff
3 for engaging in protected activity. Defendant contends that
4 temporal proximity is, as a matter of law, insufficient to create a
5 genuine issue of fact with respect to causation. This is
6 incorrect. See Villiarimo v. Aloha Isl. Air, Inc., 281 F.3d 1054,
7 1065 (9th Cir. 2002) (stating that, "in some cases, causation can
8 be inferred from timing alone where an adverse employment action
9 follows on the heels of protected activity"). The cases cited by
10 Defendant are not to the contrary.

11 Summary judgment is also not suitable for Plaintiff's CFRA
12 claims. First, Plaintiff alleges that Defendant violated CFRA by
13 failing to reinstate him to his position. Although Plaintiff
14 testified that he performed the same duties following his return to
15 work, a jury could nevertheless find that Defendant refused "to
16 honor its guarantee of reinstatement to the same or a comparable
17 position at the end of the leave," Cal. Code Regs. tit. 2,
18 § 7297.2(a), based on its effort to transfer him to the swing
19 shift. Tomlinson v. Qualcomm, Inc., 97 Cal. App. 4th 934 (2002),
20 is inapposite. There, during the plaintiff's leave of absence, the
21 defendant "implemented a company-wide reduction in work force" and
22 terminated her employment. Id. at 937. This conduct fell within
23 an exception to section 7297.2(a). See id. at 940; Cal. Code Regs.
24 tit. 2, § 7297.2(c)(1). Here, however, Defendant does not offer
25 evidence that, during Plaintiff's leave of absence, it implemented
26 its re-configuration plan or transferred Plaintiff to the swing
27 shift. Thus, there is a genuine issue of fact as to whether
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1 Defendant satisfied its reinstatement obligation under CFRA.
2 Second, Plaintiff claims that Defendant retaliated against him for
3 taking leave under CFRA. Plaintiff offers evidence that, shortly
4 after he went on leave, Defendant posted a position that included
5 duties he had been performing and, shortly after he returned from
6 leave, offered that position to Sullivan, which ultimately led to
7 Plaintiff's discharge. This evidence could support an inference
8 that Defendant retaliated against Plaintiff for taking CFRA-
9 protected leave.

10 Finally, Plaintiff offers sufficient evidence to create a
11 genuine issue of fact with respect to his claim for punitive
12 damages. There is evidence that Russey exercised "substantial
13 independent authority and judgment in [his] corporate
14 decisionmaking," which could render Defendant liable for punitive
15 damages for his actions. White v. Ultramar, Inc., 21 Cal. 4th 563,
16 567 (1999). Further, as noted above, Plaintiff offers sufficient
17 evidence to support an inference that Russey deceived him in
18 connection with the conduct of which he complains. See Cal. Civ.
19 Code § 3294(b).

20 Accordingly, Defendant's motion for summary judgment is
21 DENIED. (Docket No. 33.) As stated during the hearing on
22 Defendant's motion, the Court GRANTS Plaintiff's motion for leave
23 to file an amended complaint. (Docket No. 68.) Specifically, he
24 is granted leave to amend to plead a claim for Defendant's alleged
25 violation of his reinstatement rights under CFRA and a claim for
26 punitive damages. Plaintiff has already filed his amended
27 complaint; Defendant can rest on its current answer or it may file
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1 an amended answer within seven days of the date of this Order.

2 The Court did not rely on evidence to which the parties
3 objected. To the extent that it did, those objections are
4 overruled.

5 A final pretrial conference is scheduled to be held on June 7,
6 2011 at 2:00 p.m. A seven-day jury trial is set to begin on June
7 20, 2011 at 8:30 a.m.

8 IT IS SO ORDERED.

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10 Dated: 2/4/2011



CLAUDIA WILKEN
United States District Judge